No. 90-982 (3)

# In The Supreme Court of the United States

OCTOBER TERM, 1990

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RANBIR S. SAHNI, PETITIONER,

*v.*

HARBOR INSURANCE COMPANY

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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## REPLY BRIEF TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## REPLY BRIEF TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

1. Harbor's technical argument that petitioner is jurisdictionally time barred from seeking review of the instant case by petition for a writ of certiorari is not supported by authority and is contrary to prior decisions of this Court.

Judgment was entered in the Ninth Circuit on September 17, 1990. The petition herein was filed with this Court on December 17, 1990. Under these circumstances the petition was timely filed. (Supreme Court Rule 13)

When the petition was presented for filing it was accompanied by a proof of service in attempted compliance with Supreme Court Rule 29.5. Regrettably, however, Harbor's counsel was inadvertently omitted from the proof of service and was not served before that time. Nevertheless, Harbor's counsel did receive actual notice of the petition and its contents not later than January 8, 1991, and Harbor served petitioner with its brief in opposition to petition for writ of certiorari (the "Opposition") on January 18, 1991. Respondent has not alleged prejudice based upon these facts.

Under these circumstances this Court has jurisdiction to hear and decide the matter. See *Parker v. Levy*, 417 U.S. 733 (1974).

2. Harbor next argues that relief should not be granted to petitioner because the Ninth Circuit's decision is not significant to any party other than the litigants themselves. (Opposition, p. 4). This is not correct because the Ninth Circuit's decision could have a jurisdictional impact upon many third party cases where one party elects to join in a motion by or against another non adverse third party. Moreover, the decision in *Finley v. United States*, 490 U.S. 545 (1989) appears to be controlling over the instant case and was not followed by the court of appeals. (See Supreme Court Rule 10.1(c))

3. Harbor's third and fourth arguments overlap: Harbor says that the Ninth Circuit's decision in this case does not conflict with any decision of any federal reviewing court and that the decision in *Finley* is irrelevant. (Opposition, p. 6, 8).

Because 12 U.S.C. Section 1730(k)(1) extends jurisdiction to all "civil cases" to which the Federal Savings and Loan Insurance Corporation ("FSLIC") is a party, Harbor contends jurisdiction "logically includes" petitioner's "closely related" third party complaint. (Opposition, p. 7) Here, Harbor reasons that once petitioner's third party claim was appended, under Rules 14 and 20, to the claims against the FSLIC, the claims became an integral part of a single "case" to which the FSLIC is a party; therefore, federal jurisdiction must be conferred upon all of the claims embodied in the entire case.[1] (Opposition, p. 6, 7) Further, Harbor argues that the Ninth Circuit's decision is actually supported by the decision in *Finley*. (Opposition, p. 8). Harbor says federal jurisdiction extends to petitioner's third party complaint under Section 1730(k)(1) because that statute "grants much broader federal jurisdiction than the FTCA," and "Congress intended to grant widespread jurisdiction over suits involving the FSLIC."[2] (Opposition, p. 9) However, Harbor's reasoning is misplaced. Harbor fails to take into account all of the language contained in Section 1730(k)(1) and ignores the application of *Finley*.

Under Section 1730(k)(1) there is no federal jurisdiction supporting the state law claims against Harbor because those

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[1] The Federal Rules do not in themselves create federal jurisdiction. (See Fed. Rule Civ. Proc. 82)

[2] In *Finley*, the court dealt with federal jurisdiction under the Federal Tort Claims Act ("FTCA"), whereas the instant case is concerned with the application of jurisdiction under 12 U.S.C. 1730(k)(1) enacted as part of the Financial Institutions Supervisory Act. While this difference is an important one, it is by no means controlling. Nor does this difference render inapplicable the important principles announced therein.

claims cannot properly be deemed to arise under the laws of the United States. Additionally, the decision in *Finley v. United States*, prevents Section 1730(k)(1) from operating to confer federal jurisdiction over the claims against Harbor. Moreover, under *Finley*, there is no *independently* cognizable claim against Harbor supported by federal jurisdiction.

a. Under Section 1730(k)(1) there is no federal jurisdiction supporting the state law claims against Harbor because those claims do not arise under the laws of the United States. While placing emphasis upon the "civil case" aspect of Section 1730(k)(1), Harbor has ignored other important language contained in the statute.

In Clause (B) Congress has specifically provided that cases wherein the FSLIC is a party shall be "deemed to arise under the laws of the United States". Thus, excepting the limitations set forth in the proviso, the statute provides that the presence of the FSLIC as a party creates a federal question in what might otherwise be a case involving only state law. So read, Section 1730(k)(1) would appear to limit the grant of federal jurisdiction to those FSLIC cases in which the claims could *logically* "be deemed to arise under the laws of the United States". When the FSLIC is an adverse party to a claim it maintains or defends, not excepted by the proviso, it makes sense to treat that claim as a federal claim. In those instances the FSLIC's presence would clearly manifest some important federal interest in the outcome. But in the instant case, the FSLIC is not a party to petitioner's claims, nor is the FSLIC "adverse" to either petitioner or Harbor.[3] It is therefore difficult to see how, under Section 1730(k)(1), petitioner's state law claims against Harbor could logically be "deemed to arise under the laws of the United States." For

[3] Although the FSLIC's joinder with petitioner in making or opposing certain motions may have communicated a measure of hostility toward Harbor, this activity did not make Harbor an adverse party to the FSLIC.

this reason alone, Section 1730(k)(1) is not broad enough to grant federal jurisdiction over petitioner's third party complaint against Harbor.

The decision in *Finley* squarely holds "that with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized and will not read jurisdictional statutes broadly." *Id.*, at . Yet the construction which Harbor places upon Section 1730(k)(1) is overly broad; it goes beyond the rule announced in *Finley* by seeking to include within the ambit of the statute the appendage of state law claims against different parties who were *not* present at the time the case became federalized by the FSLIC.[4]

b. Under *Finley,* Section 1730(k)(1) cannot *itself* operate to confer federal jurisdiction over the state law claims against Harbor. In *Finley* the Court observed "a grant of jurisdiction over claims involving particular parties does not *itself* confer jurisdiction over *additional claims by or against different parties". Id.,* at . (Emphasis added.) A further examination of Section 1730(k)(1), shows that the statute "is a grant of jurisdiction over claims involving particular parties". Those particular parties are: the FSLIC, the failed institution and their adversaries in the litigation. This conclusion is supported by the language of Clause (B) referring to "any civil action, suit, or proceeding to which the [FSLIC] shall be a party". There is no doubt that in addition to the FSLIC and the failed institution, their adversaries are also included by reasonable inference. Otherwise, there could be no effective grant of federal jurisdiction over that controversy. However, the language of Clause (B) would not appear to include a grant of jurisdiction over "additional claims" against "different" parties who, like Harbor, are *not adverse* to the FSLIC. Thus

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[4] Harbor was not a party to the case at the time it was removed from state court by the FSLIC. Petitioner's third party complaint was filed against Harbor after it was removed to federal court.

applied, the decision in *Finley* prevents the use of Section 1730(k)(1) as a basis of federal jurisdiction over petitioner's claims against Harbor.

Support for petitioner's position is also found in the observation that Section 1730(k) was primarily designed to benefit the FSLIC. Indeed, the manifest purpose of Section 1730(k)(1) is to insure the FSLIC of access to federal courts in the performance of its statutory duties. See *Federal Savings and Loan Insurance Corp. v. Ticktin,* 490 U.S. 82 (1989)[5]. However, it is doubtful that Congress intended to extend the benefit of the federal system to parties like petitioner and Harbor, who are *not* adverse parties to the FSLIC, merely because they were litigants in the same "case". Those litigants who are not adversaries of the FSLIC can resolve their disputes in state courts.

c. Under *Finley*, there is no *independently* cognizable claim against Harbor supported by federal jurisdiction. In *Finley*, the Court declined to extend "jurisdiction over parties not named in any claim that is *independently* cognizable by the federal court." *Id.*, at (Emphasis added.)

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[5] The decision in *Ticktin* holds that Section 1730(k)(1) "conforms and enlarges federal jurisdiction over cases to which the FSLIC is a party." (ID., at 85).

The *Ticktin* decision concerned federal jurisdiction over an action originally commenced by the FSLIC in federal court against adverse defendants. Unlike the instant case, *Ticktin* did not focus upon the extension of federal jurisdiction under Section 1730(k)(1) to a third party complaint based upon state law filed after the case became federalized. The question presented here is whether federal jurisdiction thus enlarged (as explained in *Ticktin*) extends to petitioner's state law claims against this respondent who is an additional party, not adverse to the FSLIC.

Contrary to Harbor's view, petitioner does not contend "that the *Finley* opinion altered the unanimous decision in *Ticktin* . . . " (Opposition, p. 9)

Applied to the instant case the *Finley* decision shows that Section 1730(k)(1) cannot provide an *independent* basis for federal jurisdiction. That is because, although section 1730(k)(1) grants jurisdiction over certain claims removed to federal court, that grant does not "itself" confer jurisdiction over "additional claims made by or against different parties."

Finally, there is no other "independent" grant of federal jurisdiction extending to petitioner's third party complaint against Harbor. To the contrary, any jurisdictional basis supporting petitioner's state law claims in federal court is either dependent upon Section 1730(k)(1) or nonexistent. Diversity of citizenship, federal question or agency jurisdiction enabling petitioner to file a separate and *independent* federal action against Harbor upon the facts presented here does not exist. And it is manifestly obvious that petitioner could not have sued Harbor in a separate and *independent* federal action based upon Section 1730(k)(1). Nor does pendent-party jurisdiction exist since, under *Finley*, Section 1730(k)(1) cannot "itself" be the independent basis of federal jurisdiction supporting petitioner's action against Harbor.

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## CONCLUSION

This Court should grant the petition for a writ of certiorari because federal jurisdiction does not extend to the state law claims against Harbor. The decision of the Ninth Circuit should be reversed because it is contrary to the decision of the Supreme Court in *Finley v. United States.*

Under Section 1730(k)(1) there is no federal jurisdiction supporting the state law claims against Harbor because those claims cannot properly be deemed to arise under the laws of the United States. Additionally, the decision in *Finley v. United States*, prevents Section 1730(k)(1) from operating to

confer federal jurisdiction over the claims against Harbor. Moreover, under *Finley*, there is no *independently* cognizable claim against Harbor supported by federal jurisdiction.

Harbor's Opposition fails to show that the petition herein was not timely filed and ignores applicable case law. Harbor's reasons for denying the petition upon the merits are illogical and incorrect. Harbor also ignores the important principles announced in the decision of *Finley v. United States* and their proper application to the instant case.

Respectfully submitted,

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February, 1991